86-360

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FIRST TRUST & SAVINGS BANK OF KANKAKEE, an Illinois Banking Corporation, Administrator of the **ESTATES OF LONZO GLISPIE** and **J. T. ROBERSON, JESSIE GLISPIE**, and **LELA ROBERSON**,

Petitioners,

v.

COMMONWEALTH EDISON COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

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QUESTIONS PRESENTED

Illinois is a National Electrical Safety Code state, as are most others.

The Illinois Courts have consistently, and for years, ruled that when a person was injured or killed as a result of contact with an electric utility's supply wires in a publicly used area such as a park, shopping or manufacturing area, public street including parking, and similar places, the utility was deemed to have foreseen the incident as to both the time and place of its occurrence, thus imposing upon the utilities the strict duties contained in the National Electrical Safety Code in such instances.

The Illinois Courts in this case have refused to hold the respondent electrical utility to the same strict duty of care and foresight because the incident here litigated took place on private residential property as opposed to publicly used property.

1. Are these disparate rulings based on separate locations of accidents, both involving electrical utilities' wires, a denial of plaintiffs' decedent's rights to equal protection of the laws under the Fourteenth Amendment?

2. Is the disorder among the state and federal Courts on this subject a cause for clarification by this Court?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioners, FIRST TRUST & SAVINGS BANK OF KANKAKEE, an Illinois Banking Corporation, Administrator of the ESTATES OF LONZO GLISPIE and J. T. ROBERSON, JESSIE GLISPIE, and LELA ROBERSON, and respondent was COMMONWEALTH EDISON COMPANY.

The FIRST TRUST & SAVINGS BANK OF KANKAKEE, an Illinois Banking Corporation, Administrator of the ESTATES OF LONZO GLISPIE and J. T. ROBERSON, is a member of the Midwest Financial Group, Inc., a holding company headquartered in Peoria, Illinois.

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Petitioners,

v.

COMMONWEALTH EDISON COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

OPINIONS BELOW

The decision of the Appellate Court of Illinois, Third Judicial District, is reported at 141 Ill.App.3d 668, 95 Ill. Dec. 782, and 490 N.E.2d 255, and is set out in the Appendix at A-1. The order denying leave to appeal to the Supreme Court of Illinois is set out in the Appendix at B-1. There was no trial court opinion on this amended complaint and the judgment of the trial court is set out in the Appendix at D-1.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on March 6, 1986 and is set out in the Appendix at A-1. The order of the Supreme Court of Illinois denying leave to appeal was entered on June 3, 1986 and is set out in the Appendix at B-1. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION

The United States Constitution Fourteenth Amendment, provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

These consolidated cases stem from an incident which took place in the Village of Bourbonnais, County of Kankakee, State of Illinois, on April 16, 1977.

On that date plaintiffs' decedents were attempting to dismantle and remove a CB antenna which stood in the backyard of one Edward Palenik, from whom one of the decedents had purchased the antenna which, as installed, was around 31 feet in height. In the course of trying to lower the antenna it tipped toward respondent's 7200-volt electrical power line which was established on a utility easement on the back of the Palenik lot at a height of approximately 20 feet. The power line was not insulated, and when the antenna contacted the power line it conducted the power line's voltage into the bodies of plaintiffs' decedents, both of whom were grasping the antenna, and killed both of them instantly.

Complaints as to the death of each decedent were separately filed alleging negligence on the part of the respondent based on its failure to follow the rules of the Illinois Commerce Commission pertaining to the installation and maintenance of such lines in a safe condition.

The original complaint included Edward Palenik as a defendant but he was shortly settled out of the case. The cases were then consolidated as 79-L-19 and 79-L-20.

The original complaints contained three counts each. The first charged negligence against the respondent as noted above. The second sounded in willful and wanton and was withdrawn, although the dockets do not reveal when. The third was based on an alleged willful violation of the safety rules of the Illinois Commerce Commission under Illi-

nois Revised Statutes, then Ch. 111⅔, §77, and no federal question was involved or argued, so that this petition pertains only to Count I as amended.

The trial court dismissed Count I of the last amended complaint under somewhat curious circumstances February 8, 1985 (Rec. 79-L-19, C-210; 79-L-20, C-219). The trial court had dismissed the previous amended complaints on the grounds that the actions of the petitioners were not foreseeable as a matter of law since the respondent had not received notice of the specific intent of the petitioners' decedents to attempt to remove the antenna at the time and place where the attempt was made to remove it, and the court refused to apply the doctrine of constructive notice to the circumstances before it.

In the final complaint the allegation that the respondent had actual notice of the dangerous condition created by the presence of the CB antenna in its location considering the relative heights of the antenna and respondent's electrical power line was more particularized and the allegations pertaining to constructive notice were reintroduced.

However, shortly after the trial judge who had ruled on the case previously, received plaintiffs' memorandum of law in support of the complaints, he recused himself and the case was transferred to another judge who, after a considerable time, dismissed the complaints without comment.

Thus neither Judge of the trial court reacted to the changes.

Although the petitioners have included a copy of the master used to produce the two complaints in the Appendix, pages C1-C7, the pertinent paragraphs as far as the pleading of actual and constructive notice contained

in each of the final complaints are set forth below for the convenience of the Court:

> "10. That many vertical metal towers supporting TV and CB aerials were lawfully erected on private property adjacent to easements owned and used by defendant to establish and maintain its electrical transmission lines carrying high and dangerous voltages within its service area in the City of Kankakee and Villages of Bradley and Bourbonnais, at such distances from such transmission lines, and at such heights, that if any of them fell toward such transmission lines, such lines would be contacted by any such tower and carry the deadly current carried by such lines directly to the ground or into the body of such person or persons who was or were in contact with such falling tower.
>
> "11. That plaintiff's decedent was one of such persons who was in physical contact with such a falling tower as described above and plaintiff alleges that defendant by and through its agents and servants knew or, in the exercise of reasonable care, should have known of both the general condition described above and of the particular dangerous condition and situation of the particular tower here involved.
>
> "16. That the defendant, by its officers, agents and employees, was then and there guilty of one or more of the following negligent acts and omissions, to-wit:
>
> (c) It suspended said overhead wire or wires at a height less than 20 feet above the ground, well knowing that there were many metal towers supporting TV or CB antennas of a height well in excess of 30 feet erected in the Kankakee, Bradley, and Bourbonnais area, at such proximity to said wire or wires that if such towers, or any of them, fell toward such wire or wires, they would contact the same and conduct the deadly voltage of electricity, to-wit, about 7,200 volts, to the ground or to the body

of any person or persons such as plaintiff's decedent who might be in contact with such tower, although it knew, or, in the exercise of ordinary care, would or should have known, that such metal towers and attached antennas would be removed or replaced from time to time and that said overhead wire or wires would be dangerous and deadly to persons removing or replacing such towers or antennas in case said wire or wires were charged with high voltage electricity and were contacted by such towers."

(The antenna in question is referred to occasionally therein as a tower.)

HOW THE FEDERAL QUESTION WAS PRESENTED

After the Court dismissed the complaints petitioners moved to reconsider the order of dismissal on the grounds that by that order they were denied equal protection of the laws under the Fourteenth Amendment of the United States Constitution and the Illinois Constitution of 1970, Article I, Section 2. Appendix pages E1-E3. This motion was denied by minute order March 6, 1985, Rec. 79-L-19, C-227; 79-L-20, C-228. The appeal followed. The notice of appeal, Rec. 79-L-19, C-217; 79-L-20, C-221, specifically included the denial of the motion to reconsider.

What the Illinois Appellate Court did in essence, without saying so, was to ignore the allegations in paragraphs 11 and 16(c) to the effect that the defendant knew of the dangerous condition created by the location of the particular antenna here involved with relation to the position of its electrical power line, on the one hand, and held

that the allegation that the defendant should have known of such dangerous condition was inapplicable on the other.

The basis of the holding of inapplicability was that because the antenna was on private property, as opposed to more publicly used property, the incident was unforeseeable and that to impose constructive notice of the condition involved on the respondent, as Illinois cases do when such an accident takes place on more publicly used property, would make it an insurer.

Nowhere in its opinion, Appendix A1-A4, did the Illinois Appellate Court, Third District, discuss the basis of petitioners' contention that the respondent should have been deemed to have known or should have known of the particular dangerous condition here involved in the same manner that such utilities are deemed to have known or should have known of any dangerous condition pertaining to their electrical power lines in a place determined to be subject to use by the general public as opposed to private, i.e., residential property.

Thus petitioners' contention that persons suffering electrical power line accidents on private property were being discriminated against, in violation of the Fourteenth Amendment was ignored.

REASONS FOR GRANTING THE WRIT

I. THE ILLINOIS COURT'S OPINION DENIED PLAINTIFFS AND THOSE SIMILARLY SITUATED EQUAL PROTECTION OF THE LAWS.

There are essentially two reasons for granting the writ of certiorari in these consolidated cases. The first is logic and fairness in support of equal protection of the laws. The second is that the states are in conflict as to what is logical and fair in cases involving similar facts.

As to the first proposition, it is established in Illinois that if any accident, involving the existence, operation or maintenance of an electrical power line in a place frequented by the public such as a park, public street, commercial or manufacturing area, takes place, the utility involved is deemed to have known of the dangerous condition relative to their power lines at the place of the occurrence and is held to have foreseen the probability of harm, as a matter of law. *Merlo v. Public Service Co. of Northern Illinois*, (1942) 381 Ill. 300, *German v. Ill. Power Co.*, (1983) 115 Ill.App.3d 977, 451 N.E.2d 903, *Nelson v. Commonwealth Edison*, (1984) 124 Ill.App.3d 655, 465 N.E.2d 513.

In *German*, plaintiff, a roofing contractor, was in the process of repairing the roof of a 40-year-old warehouse. He selected the south side of the building as the best place from which to transfer his materials from the ground to the roof by his gasoline-powered hoist. His customer, however, objected and he was forced to operate from the east side of the building.

Defendant's electrical lines were located on that side of the building and were in conformity with the rules of the Illinois Commerce Commission, being more than three feet

away from the wall. At the nearest point they were attached to a pole 4 feet 8 inches from the wall but slanted outward from the wall from that point.

Plaintiff established his hoist at a place where the wires were 6 feet 9 inches from the building. The boom of the hoist with its cable and fork extended 4 feet 2 inches over the edge of the roof leaving about 2 feet of clearance from the wires.

The wind was gusty and at one point one of the workers got a small shock when the wind blew the hoist cable against the wire.

The plaintiff, assuming incorrectly that the covering of the wire was insulation, noted that there was no covering where the cable had touched the wire. He therefore moved his hoist to an area where the covering on the wire appeared to be intact.

A little later, while plaintiff was lowering the fork, a gust of wind caught the wire and blew it into the fork of plaintiff's hoist. The power line carried 12,000 volts of electricity and plaintiff was instantly shocked and severely injured.

The jury found plaintiff to have been damaged to the extent of $1,125,000, but the plaintiff was held to be 50 percent negligent and, this being a comparative negligence state, his award was reduced to $562,500.

Defendant appealed the judgment claiming it owed no duty of care to the plaintiff, or, if it did, it was only ordinary care and not the "high degree of care" set forth in a jury instruction.

It pointed out that it had no knowledge whatever of plaintiff's plan to work on the building involved or to do any work in the vicinity of its wires.

As to the matter of the defendant's owing no duty at all to the plaintiff, the court held that in spite of detailed evidence of defendant's considerable efforts to educate contractors as to what to do when working around its high voltage electrical lines and equipment, and in spite of the fact that the defendant knew nothing of plaintiff's intended or actual activity, the defendant owed the plaintiff a duty to warn him that their wires were not insulated.

The Court then took up defendant's contention that an instruction which characterized the duty that the defendant owed to the plaintiff was "a high degree of care" was not justified under the circumstances.

In addition to its approval of the use of the questioned phrase in the instruction, the Court cited *Merlo.*

In that case two workmen were killed when the boom of a crane with which they were in contact itself contacted the defendant's electrical lines existing on a parkway between a public street and the sidewalk.

The Court found defendant negligent (pp. 315-316) but held that the existence of the line was a mere condition and that the boom which contacted it was the effective intervening cause of the accident, and held for the defendant on that ground.

The *German* court nevertheless quoted with approval the description in *Merlo* (p. 314) of the degree of care owed the plaintiff's decedents as follows:

> "An electric company using highly charged wires owes the legal duty toward every person who, in the exercise of a lawful occupation in a place where he has a legal right to be, whether for business, pleasure or convenience, is liable to come in contact with the wires to see that such wires are properly placed with

> reference to the safety of such persons and are properly insulated. (18 Am. Jur. p. 485.) This is nothing more than the ordinary care required under the circumstances when put into practice. The reason for requiring insulation and vigilance in maintaining the wires in proper condition is the deadly and dangerous power of the current carried along such wires."

This is powerful language, very protective of the public, and *Merlo* in general was at least mentioned by the Illinois Appellate Court on page 3 of its opinion. (Appendix A-3.) Petitioners have no trouble with the language quoted from *Merlo* but only with the Illinois Appellate Court's attempt to zone its field of application to public safety. It is like another statute declaring that the statutory "Rules of the Road" apply only to people driving motor vehicles within the limits of organized municipalities.

The Appellate Court based its conclusion that the respondent could not be held to have foreseen the possibility of the occurrence of the accident here involved on *Clinton v. Commonwealth Edison,* (1976) 36 Ill.App.3d 1064, 344 N.E.2d 509.

In that case the plaintiff's decedent was found dead in the yard of his home which was a farmstead. His body lay beneath an electric power line stretched between a transformer and the house. Beside him was a long rod with burn marks near the top and the electrical line above was singed in one spot. There were no witnesses.

The Court initially held for the defendant on the ground that because of the circumstances of the case to hold the incident foreseeable by the defendant would be contrary to the scope of its duty to the decedent, but it sought to gild the lily by further declaring that the defendant owed no duty to plaintiff's decedent because the accident took place on private property.

This latter conclusion was reinforced as far as the Illinois Appellate Court in this case was concerned by a gratuitous observation of the Illinois Appellate Court, First District, in *Nelson* above.

That case involved two young boys who were crossing a public park playground when they found a large spool of copper wire, apparently on the ground. The spool was lying near and under an overhead electrical power line belonging to the defendant which was at least 30 feet high. The boys concocted a game in which one of them held onto one end of the wire while the other tossed the rest of the spool in the air, apparently at the electrical high line. Unfortunately, the other boy succeeded in throwing the spool over the line and the boy holding the wire (the plaintiff) was badly burned.

The Court held that the locale was a playground in a public park where children were expected to be present, that this was known to the defendant, or should have been, as was the fact that children will do almost anything in the course of play. It held that the accident was therefore foreseeable to the defendant. The case is therefore somewhat representative of those cases holding public utilities liable for events occurring in public places involving their electrical equipment, whether the utility knew such event was planned or not.

The case is not as demanding of utilities as *German* because it held that the particular condition (playground beneath the wires and the habits of children) should have put the utility on notice of the danger and caused them to re-route the wire or bury it (para. 8, 9) of 69 N.E.2d 521.

There was an extensive consideration by the Court of the understandings and misunderstandings of the concept

of foreseeability including references to Sections 435(1) and 442b illust. *Restatement (Second) of Torts* which the petitioners will not discuss, since it does not matter to them what the parameters of foreseeability may be in Illinois but only that whatever they are they should be applied evenhandedly to the petitioners' cases as well as to others.

Thus *Nelson* on its facts is a lot closer to petitioners' cases than is *German* because in the petitioners' cases they allege that a dangerous condition observable to the respondent was present for some time which should have put the respondent on notice of such condition and caused them to react to it. The general condition which petitioners have alleged fits more into the holding in *German.*

For some reason, however, the Court felt it needed to distinguish its case from *Clinton* and proceeded to do so on the ground that the incident in *Clinton* took place on private property.

The petitioners note at this point that under the facts of these cases they are not required to contend that the broad rule of constructive notice found applicable in *German* to electrical installations in public places should be applied generally where the installations are on private property. The reason for this is that the relationship between the height of the defendant's wires and the height and location of the CB antenna involved constituted a condition which was both noticeable and dangerous and had existed for a considerable length of time, and it was so alleged.

There are, however, cases from other jurisdictions which do apply the *German* rule to occurrences involving electrical power lines on or near private residential property. One is *Simon v. Tampa Electric Co.*, (1967, Florida App. D2) 202 So.2d 209. This was an action to recover for the death of an antenna installer on residential property and

the allegations were that the power lines were negligently placed in too close proximity to the residence and were insufficiently insulated. The Court held that the foreseeability requirement was met since it was reasonable to foresee that someone might come on residential property to install a television antenna.

A very similar case is *Henderson v. Kansas Power & Light Co.*, (1959) 184 Kan. 691, 339 P.2d 702.

What the petitioners are contending is that the widespread presence of such structures in a given residential area places a burden on the utility to ascertain whether any such structures are so located relative to existing electrical power lines that if an attempt is made to remove or replace such structure there would be imminent danger that such structure might tip into the power lines and injure or kill the parties involved and, if such situations are found, take necessary steps to eliminate the danger. (See para. 10, 11 and 16c of the Complaint as set forth in the Statement of Facts and 16e, all as set forth at Appendix C-4, C-5, C-6.)

Except for its exception as to electrical installation on private property, *Nelson* says that the Illinois Commerce Commission Order 160 places such a burden on electrical utilities.

Wherein then lies the distinction between such installations in publicly used areas as opposed to areas primarily residential in nature? The respondents will claim that such a responsibility toward their installations in the private residential areas lays an onerous burden upon them of inspections for, and correction of, such dangers of which they thus become aware.

Back in the days when only a few scattered TV towers and CB antennas existed, this may have been true, but

in this day of the existence of such equipment on practically every lot, no matter how small, in many areas in the nation, the importance of the problem outweighs the small expense of finding and correcting whatever problems are discovered.

It seems strange that when our court system is known to expend uncountable hours determining all aspects of whether a convicted murderer's life should be spared that the electrical utilities contend that they should not be required to spend one dime on the protection of the lives of working husbands and fathers who wish to provide television entertainment for their families or a citizen's band radio for their young son but who feel they can't afford to hire an expert to remove or replace their home TV tower or CB antenna and try to do it themselves. Unfortunately, with the help of decisions like the one below, they are being encouraged in this attitude.

There is no justification whatever for this patent discrimination in the application of the National Electrical Safety Code as promulgated by Illinois Commerce Commission Order No. 160.

The Impact Of Illinois Commerce Commission Order 160 On The Illinois Appellate Court's Position

The Illinois Commerce Commission being an administrative body of the State of Illinois, may enunciate State action, such as General Order 160. *Pacific Tel. & Telegraph Co. v. Public Utilities Commission of California,* (1979) 443 U.S. 1301, 61 L.Ed.2d 880, 100 S.Ct. 1.

It is obvious that as far as the Illinois Appellate Court is concerned, the order of the Commerce Commission had no impact, so the question is—should it have? The peti-

tioners will be setting forth below those provisions of General Order 160 which they contend clearly show a broad intent and purpose to emphasize the responsibility of electrical utilities to do everything reasonably required to protect the public from the danger inherent in the delivery of large quantities of electrical power.

In the material included under the heading ADMINISTRATIVE RULES, GENERAL ORDER 160—REVISED, SCOPE OF APPLICATION (Appendix F-1) the Commission provided that new and reconstructed power lines shall comply with the requirements of the Sixth Edition of the National Electrical Safety Code.

It next provides that where existing construction is inadequate to meet such requirements plans shall be instituted to correct the deficiencies.

The last paragraph notes that the rules contained in General Order 160 are to be considered minimum requirements, and states, "If conditions warrant, greater strength or *clearances* (italics ours) shall be provided."

Administrative Rule No. 9, *General Maintenance Requirements* (Appendix F-2) provides initially that: "Each public utility * * * shall maintain its system of lines in such condition as will enable it to furnish *safe*, (italics ours) adequate and dependable service."

The rule further sets forth that after installation, power and communication lines shall be systematically inspected and tested where necessary "to determine their fitness for the service required of them, and *for conditions of safety*" (italics ours). It goes on to pronounce that "Any defect revealed by such inspections and tests which could cause or create an *unsafe condition* (italics ours) shall be promptly corrected.

Within the Preface to *Safety Rules for the Installation and Maintenance of Electrical Supply and Communication Lines* (Appendix F-2) the following significant statement appears:

> "Rules in this Code which are to be regarded as mandatory are characterized by the use of the word 'shall.' Where a rule is of an advisory nature it is indicated by the use of the word 'should.' "

Under "DEFINITIONS" appears Definition No. 33 (Appendix F-3) as follows:

> "Guarded means covered, shielded, fenced, inclosed, or otherwise protected, by means of suitable covers or casings, barrier rails or screens, mats or platforms, to remove the liability of dangerous contact or approach by persons or objects to a point of danger.
>
> "Note: Wires which are insulated, but not otherwise protected, are not considered as guarded."

and

> Definition No. 36 (Appendix F-3):
>
> "Insulated means separated from other conducting surfaces by a dielectric substance or air space permanently offering a high resistance to the passage of current and to disruptive discharge through the substance or space.
>
> "Note: When any object is said to be insulated, it is understood to be insulated in suitable manner for the conditions to which it is subjected. Otherwise, it is, within the purpose of these rules, uninsulated. Insulating covering of conductors is one means for making the conductors insulated."

Pertinent rules appear as follows:

SEC. 20. SCOPE, NATURE, AND APPLICATION OF RULES

200. SCOPE OF RULES. (Appendix F-3 & F-4)

A. Extent of Application.
The following rules apply to electric supply and communication lines in overhead and underground construction whether operated in connection with public utilities, private or municipally owned, with industrial establishments, or otherwise.

B. Not Complete Specifications.
These rules are not complete specifications but are intended to embody the requirements which are most important from the standpoint of *safety to employees and the public.* (italics ours)

C. Conformity with Good Practice.
Construction should be made according to accepted good practice for the given local conditions in all particulars not specified in the rules.

The attention of the Court is called to paragraph B "Not Complete Specifications" above.

Rule 202 emphasizes that rules in this section provide only minimum requirements, for spacings, clearances, and strength of construction (Appendix F-5).

Two other rules are important. The first is Rule 211 (Appendix F-5) as follows:

"INSTALLATION AND MAINTENANCE.
All electric supply and communication lines and equipment shall be installed and maintained so as to reduce hazards to life as far as practicable."

The second is Rule 214 (Appendix F-5) as follows:

"A. Current-carrying Parts.
To promote safety to the general public and to employees not authorized to approach conductors and other current-carrying parts of electric

> supply lines, such parts shall be arranged so as to provide adequate clearance from the ground or other space generally accessible, or shall be provided with guards so as to isolate them effectively from accidental contact by such persons."

It is particularly noted that in 211 and 214A the word "shall" is used and not the word "should" as referred to in the portion quoted from the Preface.

With this most substantial emphasis on safety, including that of the public, how can the respondent contend, or the Courts hold, that only when members of the public are in certain locations, away from home, are they to be given the protection of the National Electrical Safety Code as set forth in General Rule No. 160?

What the Illinois Courts have done by falling on the language in *Clinton* basing, in part at least, that Court's upholding of a directed verdict for the defendant, on the ground that the accident occurred on private property, was to completely ignore the strong accent on safety of the public contained in the National Electrical Safety Code promulgated in Illinois Commerce Commission Order No. 160.

They ignored the admonitions concerning safety contained in Administrative Rule 1 (Appendix F-1) Scope and Application, and Rule 9 (Appendix F-2) (General Maintenance Requirements), Safety Rules for the Installation and Maintenance of Electric Supply and Communication Lines 200B, 211 and 214A, all of which taken together, establish the spirit of General Order 160 and its objectives as to the safety of the public.

The case of *Church of the Holy Trinity v. United States,* (1892) 143 U.S. 457, 36 L.Ed. 226, 12 S.Ct. 511, is descriptive of the relationship between the specific terms

of a statute and its spirit and objectives. The case involved a statute of the United States which prohibited the importation of aliens under a contract to perform labor.

The governing body of the church engaged an English citizen to come to New York and enter into its service as a rector and pastor.

Whether at the behest of a disgruntled parishioner or otherwise, is not set forth but the Attorney General of the United States was somehow persuaded to sue the church and its officers for the penalty provided in the statute, which penalty was imposed by the lower court.

This Court, after noting the all-encompassing use of the word "labor" in the statute, found that it was aimed at the reduction of the number of cheap laborers being brought into the country and that its title and the objective of Congress so indicated.

Based on that finding the Court held that although pastors were not included among the statute's exceptions, the Act should not be interpreted literally but according to its spirit which did not include pastors.

The respondent's and the Illinois Appellate Court's cavalier attitude toward this approach is clearly illustrated by their handling of Count III which, although not involved here, was based on the same facts.

This count was a claim for punitive damages by the wife of each decedent brought pursuant to Illinois Revised Statutes, chapter 111⅔, §77, which provided that punitive damages could be awarded if the Court found that a death or injury occurred as a result of a utility's willful omission to do anything required of it by any "rule, regulation, order * * * issued under the authority of this Act (the Act establishing the Illinois Commerce Commission)."

Petitioners contended that by failing to comply with Rules 211 and 214 above, the respondent brought itself under the provisions of Chapter 111⅔, §77, of the Illinois Revised Statutes. In defending against this contention, respondent put forward the provisions of Rule 232 (Appendix F-6) of the Commerce Commission.

This rule deals with "Vertical Clearance of Wires Above Ground or Rails." Table 1 of the Rule sets forth "*Minimum Vertical Clearance of Wires Above Ground or Rails.*" Under "Open Supply Line Wires" "750 to 1500 Volts" the table provides that when such wires cross over "spaces or ways accessible to pedestrians only" the minimum height over the ground shall be 15 feet.

The trial Court in its Memorandum on the Third Amended Complaint (it issued no Memorandum as to the Fourth Amended Complaint) and the Illinois Appellate Court on page 4 of its opinion (Appendix A-4) held that since respondent's lines were over 15 feet above ground at the place where the accident occurred, the respondent was in compliance with the rules of the Illinois Commerce Commission, the Appellate Court saying "The specific standards of Rule 232 must take precedence over the general standards of Rules 211 and 214."

Thus the Court held that respondent was not guilty of willfully omitting to follow the pertinent rules of the Commerce Commission without discussing the height of the power line in relation to that of the antenna which was within a few feet of the line. Neither did it discuss the fact that plaintiffs' decedents' activity could only speciously be claimed to classify them as "pedestrians."

Petitioners claim that Rule 232 had no classification pertaining to the decedents' activity and that the point in question has to be considered in view of the purposes of

General Order 160 as to safety, particularly as set forth in Rules 211 and 214A.

It is contemplated that respondents may raise the same point as to Rule 232 in its brief in opposition.

It should be noted here that what we are talking about is not merely the outcome of a lawsuit but, of far more importance, the lives and welfare of a substantial number of people as far as danger from electrical installations is concerned.

As things stand now, the electrical utilities will have little incentive to check for dangerous conditions and eliminate them, as contemplated by Administrative Rule 9 of General Order 160 in Illinois and in many other states.

Any dangerous condition involving electrical installations which is observable by a trained eye should be sought out by the utilities and corrected in the interest of public safety more than for the mere elimination of the risk of liability for failing to so seek out and eliminate such dangerous conditions.

When, however, the fear of liability is non-existent or eliminated, what should be the larger incentive, of plain good citizenship and responsibility, seems to disappear.

In *Thelma Levy, etc. v. Louisiana through the Charity Hospital of Louisiana at New Orleans Board of Administrators, et al.*, (1968) 391 U.S. 68, this Court had before it a strikingly similar case as far as the path of litigation was concerned, and the subject matter was equal protection of the laws. The case was brought in the Louisiana Courts on behalf of five illegitimate children for the wrongful death of their mother, which was dismissed on the ground that the Louisiana wrongful death statute, while authorizing actions in behalf of legitimate children, did not authorize actions in behalf of illegitimate children.

The Louisiana Court of Appeals affirmed, rejecting the contention that the illegitimate children were denied equal protection of the laws, and its Supreme Court denied certiorari.

In reversing the Louisiana rulings, Justice Douglas, expressing the views of six members of the Court, made the following remarks (391 U.S. 71):

> "While a State has broad power when it comes to making classifications (*Ferguson v. Skrupa*, 372 U.S. 726, 732, 10 L.Ed.2d 93, 98, 83 S.Ct. 1028, 95 A.L.R. 2d 1347) it may not draw a line which constitutes an invidious discrimination against a particular class. See *Skinner v. Oklahoma*, 316 U.S. 535, 541-542, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110. Though the test has been variously stated, the end result is whether the line drawn is a rational one. See *Morey v. Doud*, 354 U.S. 457, 465-466, 1 L.Ed.2d 1485, 1491, 1492, 77 S.Ct. 1344."

Petitioners contend that the line drawn here by the Illinois Courts "constituted an invidious discrimination against a particular class," to-wit, those injured or killed by contact with respondent's electrical power supply lines on private residential property instead of more publicly used property. They claim that these decisions deny them the protection of the provisions of the National Electrical Safety Code as promulgated by the Illinois Commerce Commission in its General Order 160.

It should be borne in mind that the brunt of this discriminatory holding is going to fall on young wage earner families who feel they cannot afford to pay expert installers to do the work required, and upon young wage earner installers who are not as expert as they thought they were, and their families.

II. CONFLICTING OPINIONS AMONG THE COURTS.

The petitioners realize that from a strict reading of Rule 17 these cases probably do not present a federal question, but from the reading of texts and their citations, much uncertainty as to the real extent of this Court's discretion in such matters is set forth.

Petitioners hasten to note that although this section of the Petition may not interest the Court as stating a ground for granting the prayer of the Petition, it will present an overview of much of the recent case law on the subject and not only the importance of the issues involved but where the majority stands and the reasoning of the Courts involved.

Although a federal question may not be presented under Rule 17, at least a nationwide question is presented. In almost all the recent cases treated in an annotation on the subject of "*Liability of Power Company for Injury or Death Resulting from Contacting of Radio or Television Antenna with Electrical Line,*" contained in 82 A.L.R.3d 113-203, are from states, like Illinois, which have adopted the National Electrical Safety Code, the provisions of which are the subject of these lawsuits. This annotation sets forth with considerable particularity the extensive conflicts between the states relative to the foreseeability of an incident by the utility involved and related issues, and therefore the need for some unifying law.

In its "Table of Jurisdictions Represented" appear cases from the Fourth Circuit Court of Appeals and the Sixth Circuit Court of Appeals, plus those from twenty-seven different states, which demonstrates the breadth and importance of the problem and the divergence of opinion especially on the subject of foreseeability.

The annotation is most particularly titled, subtitled and indexed, but because of this particularity, wherein some cases appear under three or four subheadings according to their coverage of a facet there being discussed, the petitioners deem it necessary to limit the subjects touched upon in the following discussion.

Cases Holding Foreseeability Based On Constructive Notice Where Accident Took Place On Private Residential Property For Jury

Petitioners quote below from the annotator's report of the Court's reasoning in *Galloway v. Singing River Electric Power Association*, 247 Miss. 308, 152 So.2d 710, Anno. 125, because the quotation contains so many elements which are contained in the petitioners' cases.

> "Although it was not shown that the power company had any actual notice of the fact that the 27½ foot television antenna which came into contact with uninsulated power lines resulting in injury to the plaintiff, was being maintained near to and higher than the power lines, the question of notice was for the determination of the jury, in view of the fact that a power company is required to exercise the highest degree of care in the maintenance of its power lines, and the fact that it is common knowledge that in most, if not all, parts of the state, not within the immediate area of a television station, practically all houses contain a television, some with antennas extended to considerable heights. The antenna involved in this action had been increased by 15 feet to its 27½ foot height almost three months before the accident ensued."

This quotation is deemed to be fairly representative of the reasoning of the Courts in the following cases.

ANNO.
PAGE

148 *Simon v. Tampa Electric Co.*, (1967, Fla.App.D.2) 202 So.2d 209.

148 *Henderson v. Kansas Power & Light Co.*, (1959) 184 Kan. 691, 339 P.2d 702.

148 *Texas Power & Light Co. v. Culwell*, (1931) Tex.Com.App. 34 S.W.2d 820.

152 *McKenzie v. Pacific Gas & Electric Co.*, (1962) 200 Cal.App.2d 731.

152 *Delta Electric Power Assoc. v. Burton*, (1961) 240 Miss. 209, 126 So.2d 258.

153 *Mississippi Power & Light Co. v. Shepard*, (1973, Miss.) 285 So.2d 725, 82 A.L.R.3d 86.

154 *Mississippi Power Co. v. Luter*, (1976, Miss.) 336 So.2d 753.

155 *Burk v. Missouri Power & Light Co.*, (1967, Mo.) 420 S.W.2d 274.

155 *Coatney v. Southwestern Tennessee Electric Membership Corp.*, (1956) 40 Tenn.App. 541, 292 S.W.2d 420.

155 *Kingsport Utilities, Inc. v. Lamson*, (1958, C.A. 6, Tenn.) 257 F.2d 553.

156 *Muck v. Snohomish County Public Utility District*, (1952) 41 Wash.2d 81, 247 P.2d 233.

179 *Sulphur Springs Valley Electric Cooperative, Inc. v. Beltran*, (1970) 13 Ariz.App. 513, 478 P.2d 128.

179-180 *Brown v. Vero Beach*, (1972, Fla.App.D.4) 271 So.2d 222.

Cases Holding, As The Appellate Court Held In These Cases, That The Incident Involved In The Suit Before Them Was Not Foreseeable By The Defendant Because It Occurred On Private Property

ANNO.
PAGE

169 *Northern Indiana Public Service Co. v. Howard*, (1957) 127 Ind.App. 488, 139 N.E.2d 558.

170 *Antonelli v. Ohio Edison Co.*, (1953, App.) 68 Ohio Labs 151, 121 N.E.2d 560.

171 *Johnson v. Johnson City*, (1956) 41 Tenn.App. 148, 292 S.W.2d 794.

172 *Jeffrey v. Appalachian Electric Power Co.*, (1958, D.C. W.Va.) 162 F.Supp. 95.

While the foregoing groups of cases may not comply with Rule 17, they at least show the breadth of the problem and clearly demonstrate that the Illinois Appellate Court's ruling was in the not so vast minority.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Third District.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX A

No. 3-85-0169 Filed March 6, 1986

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

FIRST TRUST & SAVINGS BANK OF KANKAKEE, an Illinois Banking Corporation, Administrator of the ESTATES OF LONZO GLISPIE and J. T. ROBERSON, JESSIE GLISPIE, and LELA ROBERSON,

Plaintiffs-Appellants,

v.

COMMONWEALTH EDISON COMPANY and EDWARD PALENIK,

Defendants-Appellees.

Appeal from the Circuit Court of Kankakee County.
Honorable **John F. Michela,** *Judge Presiding.*

Mr. JUSTICE WOMBACHER delivered the opinion of the Court:

Plaintiff appeals from the dismissal of its fourth amended complaint. We affirm.

Plaintiff is the administrator of the estates of Lonzo Glispie and J. T. Roberson. Decedents were killed when the citizens band antenna, which they were attempting to remove from the backyard of Edward Palenik, the

seller of the antenna, made contact with defendant's power lines.

Counts I and II of the complaint allege that defendant was negligent in maintaining its power lines by failing to insulate adequately, failing to maintain the lines at an adequate height, failing to warn of the danger posed by the lines and by allowing the wires to remain unguarded within the meaning of General Order No. 160 of the Illinois Commerce Commission. Count III, based on specific Commerce Commission rules, seeks actual and punitive damages under the Public Utilities Act, Ill.Rev.Stat. 1981, ch. 111⅔, sec. 77.

The trial court dismissed Counts I and II for failure to state a cause of action. In dismissing plaintiff's third amended complaint, Judge Dyer wrote a thorough memorandum explaining the basis for his ruling. Judge Michela dismissed the fourth amended complaint following Judge Dyer's recusal, but offered no conclusions of law. Thus, our analysis will center on Judge Dyer's order.

Principal reliance was placed on *Clinton v. Commonwealth Edison* (1976), 36 Ill.App.3d 1064, 344 N.E.2d 509. As here, plaintiff was electrocuted on private property when contact was made with an overhead power line. The court held that there was no duty on defendant's part to guard against the injury in question because it was not reasonably foreseeable.

The plaintiff attempts to distinguish *Clinton* because the instant complaint alleges the existence of an ongoing condition of which defendants were or should have been aware. Plaintiff alleges that a duty to maintain power lines in a particular fashion arose because defendant was on constructive notice of the existence of television and citizens band towers which might make contact with its lines under certain circumstances. This theory is derived from the annotation at 83 A.L.R. 3d 113 discussing *Mississippi P & L Co. v. Shepard* (Miss. 1973), 285 So.2d 725 and similar cases. To the extent that *Shepard* and its progeny diverge from the general rule that one only has a duty

to protect against occurrences which are reasonably foreseeable (*Cunis v. Brennan* (1974), 56 Ill.2d 372, 308 N.E. 2d 613), we reject the holding.

If the plaintiff's theory of constructive notice were adopted, it would necessarily entail the rejection of concepts developed over a series of similar cases and cast defendant in the role of insurer. Defendant is doubtless aware of numerous species of hazards which, in the abstract, pose a threat of power line contact. If the prevalence of lofty metal towers is sufficient to raise a duty to protect against dangers from a particular tower, then the defendant should also have a duty to guard against mischievous or curious children, since their existence and propensity to hurt themselves in power line accidents is a matter of common knowledge. But courts have not drawn the line in that fashion.

Instead, it must be the case that the company is on notice of the presence of children playing near a *particular* hazard. (*Nelson v. Commonwealth Edison* (1984), 124 Ill.App.3d 655, 465 N.E.2d 513). Hence, the critical determination is whether the company knew or should have known of the *particular* dangerous condition so that it would be reasonably foreseeable that an injury of the kind in question would occur. *Merlo v. Public Service Company* (1942), 381 Ill. 300, 45 N.E.2d 665.

We believe the instant complaint fails to allege a legal duty. In view of the fact that this represents the plaintiff's fourth attempt to plead a set of facts which would give rise to a legal duty, we are disinclined to remand to allow plaintiff the opportunity to replead. Where the fertile mind of an experienced pleader cannot, after four valiant tries, set forth facts, as opposed to conclusions, stating the necessary elements of a cause of action, we must mercifully say, "Hold! Enough!" Therefore, we affirm the dismissal of Counts I and II.

The dismissal of Count III is also affirmed. Plaintiff alleged that Rules 211 and 214 of General Order 160 were violated by the construction of the power lines in question. Rule 211 states:

> "All electrical supply and communication lines and equipment shall be installed and maintained so as to reduce hazards to life as far as practicable."

Rule 214 is of a similarly general character. The trial court found that Rule 232 took precedence over Rules 211 and 214. Rule 232 provides for a minimum clearance of 15 feet for power lines suspended over "spaces or ways accessible to pedestrians only." The record supports the finding that Rule 232 applied to the lines over the Palenik property. The specific standards of Rule 232 must take precedence over the general standards of Rules 211 and 214.

We therefore affirm the dismissal of the complaint.

AFFIRMED.

HEIPLE, P.J. and BARRY, J., concur.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 3, 1986

Mr. Edwin W. Sale
Attorney at Law
One Dearborn Square, S#440
Kankakee, IL 60901

No. 63346—First Trust & Savings Bank of Kankakee, etc., et al., petitioners, v. Commonwealth Edison Company, et al., respondents.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

APPENDIX C

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

FIRST TRUST & SAVINGS BANK OF KANKAKEE, an Illinois banking corporation, Administrator of the Estate of * * * , deceased, and * * *

Plaintiffs

v.

COMMONWEALTH EDISON COMPANY and EDWARD PALENIK,

Defendants

FOURTH AMENDED COMPLAINT

COUNT I

Plaintiff FIRST TRUST & SAVINGS BANK OF KANKAKEE, as Administrator of the Estate of * * * by its attorneys, George A. Cottrell and Robert G. James of Indianapolis, Indiana, and Edwin W. Sale and William O. Schmidt, complaining of defendant, COMMONWEALTH EDISON COMPANY, alleges as follows:

1. Plaintiff is the duly appointed, qualified and acting Administrator of the Estate of * * * (hereinafter designated as the decedent), pursuant to an Order entered and letters of administration issued by the Probate Division of the Circuit Court of the Twelfth Judicial Circuit, Kankakee County, Illinois, on February 3, 1978, in a proceeding entitled "In the Matter of the Estate of * * * File No. 78-P- , a copy of said letters of administration be-

ing attached hereto, marked "Exhibit A", and made a part hereof.

2. Plaintiff brings this action as such Administrator pursuant to, and as authorized by, Chapter 70 of the Illinois Revised Statutes of 1975.

3. That on April 16, 1977, at about 6:30 p.m., the decedent, * * * was lawfully present at the residence of said Edward Palenik, located at 56 Jordan Drive, Bourbonnais, Illinois, attempting to remove a metal tower to the top of which a citizens' band (CB) antenna was attached, which had been purchased from Palenik, from its base in the rear of said Palenik's backyard, with the assistance of * * * and Palenik.

4. That the surroundings were totally unfamiliar to * * * and he had little or no involvement with electricity especially with the transmission of high voltage thereof, in his work experience or otherwise.

5. That, at all times hereinafter mentioned, defendant, COMMONWEALTH EDISON COMPANY, was, and still is, a corporation, organized and existing under the laws of the State of Illinois, having its principal office and place of business in the City of Chicago, Cook County, Illinois, owning, controlling, operating and maintaining a certain plant for production of electricity, together with apparatus, equipment and facilities for the transmission and delivery thereof in the Village of Bourbonnais, Kankakee County, Illinois, and engaged in the business of furnishing electricity to inhabitants of that community for lighting and other purposes.

6. That at that time, defendant, COMMONWEALTH EDISON COMPANY, possessed or owned, and controlled and maintained, a certain wire or wires, which was, or were, strung and suspended along, in and upon the rear of the lots and residences, including Palenik's, located on Jordan Drive, being a public highway or street in the Village of Bourbonnais, Kankakee County, Illinois.

7. That at said time and place said defendant transmitted, or caused the transmission, through said wire or wires, of electricity of a high and dangerous voltage, which would cause severe or fatal injuries to persons coming in contact therewith directly or indirectly.

8. That the proximity of said wire or wires and the relative heights of such wire or wires on the one hand and the tower and attached antenna on the other were such as to produce a dangerous condition, which would be a "structural conflict" by analogy to Definition 16 of General Order 160 of the Illinois Commerce Commission, if the tower and antenna carried an electrical transmission line, in that if the tower and antenna overturned at ground level and fell toward the transmission line it would contact the same and itself become a conductor of the high and dangerous voltage carried by the line.

9. That although the wires transmitting the defendant's electricity were visible from the ground, neither the voltage carried by such wires nor the significance thereof were known to plaintiff's decedent, and the distances between said transmission wires and the tower in question, together with the heights involved, were such that it could not reasonably be expected that a layman such as plaintiff's decedent could discern, by Normal observation, that if the tower leaned or fell toward such transmission wires contact between such wires and said tower would inevitably result, or, if it did, what would happen.

10. That many vertical metal towers supporting TV and CB aerials were lawfully erected on private property adjacent to easements owned and used by defendant to establish and maintain its electrical transmission lines carrying high and dangerous voltages within its service area in the City of Kankakee and villages of Bradley and Bourbonnais, at such distances from such transmission lines, and at such heights, that if any of them fell toward such transmission lines, such lines would be contacted by any such tower and carry the deadly current carried by such lines directly to the ground or into the body of such

person or persons who was or were in contact with such falling tower.

11. That plaintiff's decedent was one of such persons who was in physical contact with such a falling tower as described above and plaintiff alleges that defendant by and through its agents and servants knew or, in the exercise of reasonable care, should have known of both the general condition described above and of the particular dangerous condition and situation of the particular tower here involved.

12. That Rule No. 211 of General Order 160-Revised of the Illinois Commerce Commission, said Order being applicable in all respects to the defendant, reads as follows:

"211. INSTALLATION AND MAINTENANCE.
All electric supply and communication lines and equipment shall be installed and maintained so as to reduce hazards to life as far as practicable,"

and Rule 214 of said General Order reads as follows:

"214. ISOLATION AND GUARDING.
A. Current-Carrying Parts.
To promote safety to the general public and to employees not authorized to approach conductors and other current-carrying parts of electric supply lines, such parts shall be arranged so as to provide adequate clearance from the ground or other space generally accessible, or shall be provided with guards so as to isolate them effectively from accidental contact by such persons."

13. That the proximity of defendant's wire or wires to the tower and antenna being removed from its position in the Palenik backyard and the relative heights of the tower and antenna on the one hand and defendant's wire or wires on the other, were such as to place plaintiff's decedent in a place "generally accessible" to defendant's "other current-carrying parts of (its) electric supply line" as soon as he attempted the manual removal of said tower and antenna from its base.

14. That it, therefore, became, and was the duty of defendant, by its officers, agents, and employees, carefully and properly to guard and protect said current-carrying parts of its electric supply lines either by insulating said wire or wires or arranging them so as to provide adequate clearance from existing antennas or TV towers so that persons lawfully present in and upon private properties would not accidentally contact said current-carrying parts of defendant's electric supply lines, or, in the case of such contact, would not be injured or electrocuted thereby.

15. That on or about April 16, 1977, at approximately 6:30 p.m., while he was acting as aforesaid, said decedent, in order to remove said TV tower, was holding or was otherwise in contact with the same, when it accidentally fell onto and upon said overhead wire or wires installed and maintained by defendant, and, as a direct and proximate result of negligence of defendant, by its officers, agents and employees, as hereinafter specified, a deadly current of electricity, to-wit, about 7200 volts, passed from said overhead wires, or one of them, into said tower and thence to his body, thereby instantly electrocuting him; whereof he died on the day and hour last aforesaid, and within two years prior to the commencement of this action.

16. That defendant, by its officers, agents and employees, was then and there guilty of one or more of the following negligent acts and omissions, to-wit:

a) It failed to have said overhead wires insulated or otherwise protected against escape of electricity therefrom;

b) It failed to warn people lawfully on its customers' premises, including said decedent, of the dangerous character of said overhead wires;

c) It suspended said overhead wire or wires at a height less than 20 feet above the ground, well knowing that there were many metal towers supporting TV or CB antennas of a height well in excess of 30 feet erected in the Kankakee, Bradley,

and Bourbonnais area, at such proximity to said wire or wires that if such towers, or any of them, fell toward such wire or wires, they would contact the same and conduct the deadly voltage of electricity, to-wit, about 7200 volts, to the ground or to the body of any person or persons such as plaintiff's decedent who might be in contact with such tower, although it knew, or, in the exercise of ordinary care, would or should have known, that said metal towers and attached antennas would be removed or replaced from time to time and that said overhead wire or wires would be dangerous and deadly to persons removing or replacing such towers or antennas in case said wire or wires were charged with high voltage electricity and were contacted by such towers.

d) It negligently failed to maintain said wire or wires in safe condition, with adequate and sufficient insulation thereon or to arrange said wire or wires so as to provide adequate clearance from the existing TV towers or antennas on private property.

e) It allowed said wires to remain unguarded, as described in definition No. 33 of General Order No. 160-Revised of the Illinois Commerce Commission, after said metal tower and attached antenna was erected, at an unsafe distance from said wire or wires and to remain unguarded for a long period of time, contrary to Rules 211 and 214 of said General Order No. 160, when it was practicable to so guard said wires by either elevating its wires to a height which would prevent the falling tower from contacting its current-carrying parts, or to install said wire or wires underground for the distance required to prevent any such contact.

17. As a direct and proximate result of one or more of the aforementioned negligent acts or omissions by defendant, the TV tower decedent was attempting to remove with the assistance of * * * and Edward Palenik

accidentally came into contact with said wire or wires, and decedent was burned, shocked, and otherise injured, both internally and externally, of which injuries he died on April 16, 1977, and within two years prior to the commencement of this action.

18. The decedent left him surviving his wife, * * *.

19. By reason of the wrongful death of decedent, said surviving spouse has been deprived of her means of support and the children have been deprived of their means of support and education and his aforementioned heirs and next of kin have, and each of them has, been deprived of large sums of money and valuable services which said decedent was accustomed to contribute to and perform for them and would have continued to contribute and perform but for his wrongful death, and substantial burial and funeral expenses were incurred, to the damage of plaintiff, as Administrator aforesaid.

WHEREFORE, plaintiff, FIRST TRUST & SAVINGS BANK OF KANKAKEE, as Administrator of the Estate of * * * deceased, demands judgment against defendant, COMMONWEALTH EDISON COMPANY, in such sums of money as will fairly and reasonably compensate the decedent's aforementioned heirs and next of kin for their damages set forth above and for the purpose of assignment, plaintiff alleges said damages exceed the sum of Fifteen Thousand Dollars ($15,000.00).

[Counts II and III omitted in printing]

APPENDIX D

[Filed February 8, 1985]

STATE OF ILLINOIS
COUNTY OF WILL—SS.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

Nos. 79L19 and 79L20 (Consolidated)

FIRST TRUST & SAVINGS BANK OF KANKAKEE, an Illinois Banking Corporation, Administrator of the ESTATES OF LONZO GLISPIE and J. T. ROBERSON,

Plaintiffs,

vs.

COMMONWEALTH EDISON COMPANY and EDWARD PALENIK,

Defendants.

ORDER OF DISMISSAL

AND NOW on this 12th day of December, 1984, this cause coming on to be heard upon the Defendant's, COMMONWEALTH EDISON COMPANY'S, Motions to Strike Counts I, II and III of the two Fourth Amended Complaints in this consolidated cause, and to dismiss both of said actions against COMMONWEALTH EDISON COMPANY, and the court having considered the Memorandum

of Authorities in support of said Motions to Strike and Dismiss; Plaintif's Memoranda in opposition to said Motions to Strike and Dismiss, and Defendant, COMMONWEALTH EDISON COMPANY'S reply to Plaintiffs Memoranda, and the court having heard the oral arguments in support of said motions and in opposition thereto, takes said motions under advisement.

AND NOW on this 4th day of February, 1985, these consolidated causes coming on again to be heard pursuant to said advisement, and the court having read the respective complaints herein and considered said oral arguments and the memorandum of the Defendant, COMMONWEALTH EDISON COMPANY, in support of said Motions and the Memoranda of the Plaintiffs in opposition thereto, and the court being fully advised in the premises, finds that Counts I, II and III of said Fourth Amended Complaints, respectively, do not state a cause of action and that the Defendant, COMMONWEALTH EDISON COMPANY'S Motion to Strike and Dismiss should be granted.

IT IS THEREFORE ORDERED that Counts I, II and III of both of the Fourth Amended Complaints in this consolidated cause be, and the same are hereby stricken and that both of the two consolidated causes be, and the same are hereby dismissed, that the Plaintiffs take nothing and that the Defendant, COMMONWEALTH EDISON COMPANY, go hence without day and that the Defendant, COMMONWEALTH EDISON COMPANY, recover from each of the Plaintiffs its costs herein.

ENTER:

/s/ JOHN F. MICHELA
JUDGE

APPENDIX E

[Filed March 5, 1986]

STATE OF ILLINOIS
COUNTY OF KANKAKEE—SS.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

Nos. 79 L 19 and 79 L 20 (Consolidated)

FIRST TRUST & SAVINGS BANK OF KANKAKEE, an Illinois Banking Corporation, Administrator of the ESTATES OF LONZO GLISPIE and J. T. ROBERSON,

Plaintiffs

v.

COMMONWEALTH EDISON COMPANY and EDWARD PALENIK,

Defendants

MOTION TO RECONSIDER ORDER OF DISMISSAL

The plaintiffs, by their attorneys, Edwin W. Sale and William O. Schmidt, respectfully request this court to reverse its Order of Dismissal in the above-entitled causes, and as reasons therefor give the following:

The plaintiffs contend that the condition present in the Kankakee-Bradley-Bourbonnais area of having numerous TV, CB and other towers so positioned on private property adjacent to defendant's easements that should they be caused to fall toward defendant's power lines they would contact the same and thus endanger the lives, health and welfare of any person or persons who were lawfully in contact with the bottom portion of such falling tower, is a condition providing notice to the defendant of the possibility of such a lethal and injurious contact being made in the same manner that such notice is held by numerous courts to be provided by the mere fact that its lines are strung in areas frequented by the public.

Nelson v. Commonwealth Edison,
2d District (1984)
80 Ill.Dec. 401
124 Ill.App.3d 655

German v. Illinois Power Co.,
First District (1983)
71 Ill.Dec. 749
115 Ill.App.3d 977

Bitner v. Central Illinois Light Co.,
Third District (1979)
31 Ill.Dec. 290
75 Ill.App.3d 715

Harris v. Commonwealth Edison, et al.,
300 N.E.Reporter 2d 824
13 Ill.App.3d 559

Plaintiffs further contend that this condition pertaining to private towers places these plaintiffs in the same situation as to notice on the part of the defendant as the plaintiffs in the above listed cases, and contend that the dismissal of their Complaints for the reasons given denies them equal protection of the laws under the Fourteenth Amendment of the United States Constitution and the Illinois Constitution of 1970, Article I Section 2.

Shelley v. Kraemer,
92 L.Ed. 1161 (1948)

New York Times Co. v. Sullivan,
11 L.Ed.2d 686 (1964)

Edwards v. Habib,
397 F.2d 687 (1968)

Respectfully submitted,

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APPENDIX F

Pertinent Portions Of Illinois Commerce Commission General Order No. 160 As Revised In 1962

ADMINISTRATIVE RULES
GENERAL ORDER NO. 160—REVISED

1. SCOPE AND APPLICATION.

All new or reconstructed power and communication lines over which this Commission has jurisdiction shall comply with the requirements set forth in the National Bureau of Standards Handbook 81 entitled "Safety Rules for the Installation and Maintenance of Electric Supply and Communication Lines," compromising Part 2 (the Definitions, and the Grounding Rules) of the Sixth Edition of the National Electrical Safety Code.

Where existing construction is inadequate to meet these requirements, plans shall be instituted to eliminate all situations and conditions not in substantial agreement with these rules as expeditiously as practicable. If in the opinion of the Commission public interest requires it, the Commission may order reconstruction or alteration of existing line facilities.

These rules shall be considered generally as meeting the minimum requirements. If conditions warrant, greater strength or clearances shall be provided. The requirements specified herein shall not relieve any public utility of any statutory requirement such as securing the right, authority, easement or permission to locate and maintain the facilities proposed.

* * * * *

9. GENERAL MAINTENANCE REQUIREMENTS.

Each public utility operating a system of power or communication lines shall maintain its system of lines in such condition as will enable it to furnish safe, adequate and dependable service.

Power and communication lines and their associated equipment shall comply with the provisions of this General Order when placed in service, and shall thereafter be systematically inspected, and when necessary, be subjected to tests to determine their fitness for the service required of them, and for conditions of safety. Any defects revealed by such inspections and tests which could cause or create an unsafe condition, shall be promptly corrected. If such corrections are not immediately undertaken, a record of the condition found shall be made in the proper plant office of the utility. Defective lines or their associated equipment shall be placed in good operating condition, or otherwise effectively disconnected or removed.

* * * * *

PREFACE

* * * * *

Rules in this code which are to be regarded as mandatory are characterized by the use of the word "shall." Where a rule is of an advisory nature it is indicated by the use of the word "should." Other practices which are considered desirable and not intended to be mandatory are stated as recommendations. It is realized that conditions may exist which necessitate departures from such recommendations. (italics ours)

* * * * *

33. **Guarded** means covered, shielded, fenced, inclosed, or otherwise protected, by means of suitable covers or casings, barrier rails or screens, mats or platforms, to remove the liability of dangerous contact or approach by persons or objects to a point of danger.

Note: Wires which are insulated, but not otherwise protected, are not considered as guarded.

* * * * *

36. **Insulated** means separated from other conducting surfaces by a dielectric substance or air space permanently offering a high resistance to the passage of current and to disruptive discharge through the substance or space.

Note: When any object is said to be insulated, it is understood to be insulated in suitable manner for the conditions to which it is subjected. Otherwise, it is, within the purpose of these rules, uninsulated. Insulating covering of conductors is one means for making the conductors insulated.

* * * * *

SEC. 20. SCOPE, NATURE AND APPLICATION OF RULES

200. SCOPE OF RULES.

A. Extent of Application.

The following rules apply to electric supply and communication lines in overhead and underground construction whether operated in connection with public utilities, privately or municipally owned, with industrial establishments, or otherwise.

B. Not Complete Specifications.

These rules are not complete specifications but are intended to embody the requirements which are most important from the standpoint of safety to employees and the public.

C. Conformity with Good Practice.

Construction should be made according to accepted good practice for the given local conditions in all particulars not specified in the rules.

201. APPLICATION OF THE RULES AND EXEMPTIONS.

A. Intent, Modification.

The rules shall apply to all installations except as modified or waived by the proper administrative authority. They are intended to be so modified or waived whenever they involve expense not justified by the protection secured or for any other reasons are impracticable; or whenever equivalent or safer construction can be more readily provided in other ways.

B. Realization of Intent.

The intent of the rules will be realized:

1. By applying the rules in full to all new installations, reconstructions, and extensions, except where for special reasons any rule is shown to be impracticable or where the advantage of uniformity with existing construction is greater than the advantage of construction in conformity with the rules.

* * * * *

202. MINIMUM REQUIREMENTS.

The rules state the minimum requirements for spacings, clearances, and strength of construction. More ample spacings and clearances or greater strength of construction may be provided if other requirements are not neglected in so doing.

Note: Some of these minimum values are exceeded in much existing construction; service requirements frequently call for stronger supports and higher factors of safety than the minimum requirements of these rules.

SEC. 21. GENERAL REQUIREMENTS APPLYING TO OVERHEAD AND UNDERGROUND LINES

* * * * *

211. INSTALLATION AND MAINTENANCE.

All electric supply and communication lines and equipment shall be installed and maintained so as to reduce hazards to life as far as practicable.

* * * * *

214. ISOLATION AND GUARDING.

A. Current-carrying Parts.

To promote safety to the general public and to employees not authorized to approach conductors and other current-carrying parts of electric supply lines, such parts shall be arranged so as to provide adequate clearance from the ground or other space generally accessible, or shall be provided with guards so as to isolate them effectively from accidental contact by such persons.

* * * * *

232. A. BASIC CLEARANCES—CONTINUED

TABLE 1—*Minimum vertical clearance of wires above ground or rails*

[Supply wires include trolley feeders]

Nature of ground or rails underneath wires	Guys; messengers; communication, span, and lightning protection wires; communication cable supply cable having effectively grounded continuous metal sheath, or insulated conductors supported on and cabled together with an effectively grounded messenger, all voltages	Open supply line wires, arc wires and service drops	
		0 to 750 volts	750 to 15,000 volts
WHERE WIRES CROSS OVER			
Track rails of railroads (except electrified railroads using overhead trolley conductors) handling freight cars on top of which men are permitted	*Feet* 27	*Feet* 27	*Feet* 28
Track rails of railroads (except electrified railroads using overhead trolley conductors) not included above	18	18	20
Public streets, alleys or roads in urban or rural districts ..	18	18	20
Driveways to residence garages	10	10	20
Spaces or ways accessible to pedestrians only	15	15	15

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No. 86-360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FIRST TRUST & SAVINGS BANK OF KANKAKEE, an Illinois Banking Corporation, Administrator of the **ESTATES OF LONZO GLISPIE** and **J. T. ROBERSON, JESSIE GLISPIE**, and **LELA ROBERSON**,

Petitioners,

v.

COMMONWEALTH EDISON COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent opposes the Petition for Writ of Certiorari on the following grounds:

I. LACK OF JURISDICTION

The Petition for Certiorari should be denied because this court lacks jurisdiction to grant the writ of certiorari requested. The Court's Certiorari jurisdiction over state court decisions is limited by 28 U.S.C. Sec. 1257 to "Final judgments or decrees rendered by the highest Court of a state in which a decision could be had." Petitioners invoke said 28 U.S.C. Sec. 1257 to show jurisdiction.

The Petitioners seek certiorari with respect to the opinion of the *Appellate* Court of Illinois, Third Judicial District, affirming the dismissal of the Fourth Amended Complaint and dismissal of the case (Pet. pp. 6, 7 & 8).

The highest Court in Illinois in which a decision could be had is the Illinois Supreme Court. This court refused Petitioners' Petition for leave to appeal from the Appellate Court (Pet. App. B-1). In doing so, the Illinois Supreme Court refused to pass on the Appellate Court's opinion and therefore made no decision in the case.

The Petition itself seeks a writ of certiorari directed to the *Appellate* Court of Illinois, Third Judicial District, not to the Illinois Supreme Court, and therefore fails to meet the jurisdictional requirements of said section 1257.

Without waiving or abandoning said lack of jurisdiction, Defendant sets forth below several additional grounds for the denial of the Petition.

II. DIFFERENCES BETWEEN COURTS OF VARIOUS STATES

Petitioners (p. 8) contend a reason for granting the Petition is that the various state decisions are in conflict. However Section One of the Fourteenth Amendment provides that no state shall "Deny to *any person within its jurisdiction* the equal protection of the laws."

Petitioners rely on conflict of cases arising in various states which do not involve persons within Illinois and which are not covered by the equal protection amendment.

Such a conflict may be merely corollary to a *permissible* difference of opinion between state courts (32A Am. Jur. 2d Sec. 786, p. 234), and does not violate the equal protection clause of the amendment.

III. NO FEDERAL QUESTION INVOLVED

The dismissal of counts I and II of the Fourth Amended Complaint was affirmed by the Illinois Appellate Court based on Plaintiffs' failure to plead facts showing that the Defendant company knew of a *particular* dangerous condition so that it would be reasonably foreseeable that an injury would occur. And that therefore the Fourth Amended Complaint failed to allege a legal duty.

Plaintiffs attempted to supply this deficiency by contending that Defendant was charged with constructive notice of the alleged dangers from the *particular* tower by reason of many TV towers in the general area under the holding in the *Mississippi P & L Co. v. Shephard* case (Pet. p. 26).

The appellate court rejected the *Mississippi* case because it was contrary to the general rule in Illinois that one only has a duty to protect against occurrences which are reasonably foreseeable, which in turn must be based on knowledge of the particular dangerous condition.

The Court held that if Plaintiffs' theory of constructive notice were adopted it would entail the rejection of concepts developed over a series of similar Illinois cases and improperly cast the Defendant in the role of insurer. This holding did not involve a federal question but only the question of what facts need be alleged to charge Defendant with notice of a dangerous condition.

IV. DECISION NOT BASED ON FEDERAL QUESTION

In addition to Plaintiffs' reliance on constructive notice, Petitioners contend that the distinction between a power company's duties with respect to its lines over public property as opposed to private property denied Plaintiffs

equal protection of the laws under the Fourteenth Amendment.

But neither the Appellate Court (Pet. App. A-1) nor the two opinions of the trial judge (Rec. *C86*, and *C130*) are based upon any such distinction, nor even mentioned in either of said opinions.

Plaintiffs based their case on constructive notice of a dangerous condition and in so doing admitted that Respondent had no actual notice.

This position was rejected as contrary to settled Illinois law which requires knowledge of the *particular* dangerous condition so that it would be reasonably foreseeable that injury would occur.

> *Clinton v. Commonwealth Edison*, (1st Dist. 1976) 36 Ill. App. 3d 1064, 344 N.E. 2d 509
>
> *Stambaugh v. Central Illinois Light Company*, (3rd Dist. 1976) 42 Ill. App. 3d 582, 356 N.E. 2d 148
>
> *Nelson v. Commonwealth Edison*, (2nd Dist. 1984) 465 N.E. 2d 513, 80 Ill. Dec. 401
>
> *Foote v. Scott-New Madrid-Mississippi Electric Co-operative*, (Mo. App. 1962) 359 S.W. 2d 40
>
> *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300 (1942)

The Court decided the case on the failure of Plaintiffs to allege facts showing knowledge of a particular dangerous condition.

The Court's decision was based solely on non-federal grounds. How one can make a federal question out of whether facts are alleged showing notice of a dangerous condition is very difficult to fathom.

V. FOURTEENTH AMENDMENT NEVER PLED—DECISION NOT BASED THEREON

Petitioners attempt to create a federal question out of the distinction the Illinois Courts make between the Defendant's duties with respect to its power lines installed over public properties, such as streets and other public places, on the one hand, and lines over private properties such as, in this case, the backyard of a residence. Such a distinction is part of the settled law in Illinois, is reasonable and sound and is based upon the marked differences in the use made of public streets, playgrounds and the like and the use normally made of residential backyards, such as gardens, lawns, etc.

In this connection it is pointed out that, as stated, neither the appellate Court nor the trial Court based its ruling on this distinction, but solely on Plaintiffs' failure to allege facts showing knowledge by Defendant of a particular dangerous condition.

None of the several complaints in this case pled any violation of the Fourteenth Amendment. After the Court dismissed the Fourth Amended complaint (Pet. App. D), Petitioners filed a Motion to Reconsider (Pet. App. E), in which they for the first time contended that the dismissal of the Fourth Amended Complaint denied them equal protection of the laws under the Fourteenth Amendment.

The Trial Court denied the Motion to Reconsider—and the Appellate Court affirmed the Trial Court without reference to the Fourteenth Amendment contention—but upon the sole, non-federal grounds that the Petitioners failed to allege facts showing that Defendant had knowledge of the alleged *particular* dangerous condition.

VI. NO SPECIAL AND IMPORTANT REASON AS REQUIRED BY SUPREME COURT RULE 17 IS SHOWN, NOR IS THE SUBSTANTIAL QUESTION REQUIREMENT MET.

In spite of the Illinois Supreme Court's denial of leave to appeal, Petitioners desperately seek to have their case reviewed by this Court and in so doing attempt to create a federal question where none exists.

Without any facts alleged in the complaint, or on any basis whatever, Petitioners contend that the outcome of the lawsuit would affect the lives and welfare of a substantial number of people (Pet. 22). The same may be said of any number of lawsuits such as the thousands of lawsuits involving automobile accidents, personal injuries generally and the like—but that does not make them proper subjects for certiorari or create a federal question, much less furnish a special and important reason or a substantial federal question for certiorari.

This case is just an ordinary, everyday, mine-run death case, in which the Fourth Amended Complaint failed to state facts showing a duty on the part of the Defendant. The Petitioners had four chances to allege facts showing that the Defendant had knowledge of a particular dangerous condition which, in turn, would make the injury reasonably foreseeable. This they did not do.

Although Defendant contends there is no substantial question whatever in this case, even if there might be, where the state court judgment rests on two grounds, one federal the other not, this court has denied certiorari. 32A Am. Jur. 2d Sec. 784, p. 233.

For the reasons that Petitioners in "II. conflicting opinions among the Courts (Pet. 24) admit that a federal question is not presented," Defendant will not comment on the same except to say that the Mississippi *Galloway* case quoted (Pet. p. 25) is clearly contrary to the settled law in Illinois.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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